In the Supreme Court of the United States

OCTOBER TERM, 1953

AMERICAN BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

I. *The Board based its conclusion that petitioner's business "affected commerce" within the meaning of the Act, entirely on its finding that petitioner was part of a "multi-state enterprise."*

For the first time in the course of this litigation it is now suggested by the Government that the Board predicated its finding that it had "legal" jurisdiction over petitioner—*i.e.*, that petitioner was engaged in "commerce" within the meaning of the Act—on the ground that petitioner imported miscellaneous supplies valued at approximately $125,000 from outside the State of Texas, and that the Board's finding that petitioner served as "an essential link in a multi-state system of manufacture and distribution" was relevant only to the Board's discretionary determination to exercise the jurisdiction which

it thus derived from the petitioner's out-of-state imports. The Board's findings and rationale, however, as well as the pattern of Board holdings in other cases dealing with "multi-state systems," show conclusively that this belatedly concocted explanation is a fiction invented solely for the purpose of defeating review by this Court of the misconception of law upon which the Board in fact based its finding that petitioner is subject to the Act.

The jurisdictional findings made by the Trial Examiner were adopted *in toto* by the Board. Although these findings cover more than four printed pages in the official report (99 NLRB at 358-362), the item of imports is mentioned only once, in the first paragraph, in the course of summation of the terms of a stipulation entered into by the parties. The rest of the extensive findings are devoted entirely to demonstrating that petitioner functions as an "integral part of a multi-state enterprise."

In language too clear to admit of ambiguity the decision makes it plain that petitioner was found to be engaged in commerce within the meaning of the Act solely because of this finding that it was an "essential link" in a "multi-state enterprise." First the Examiner held (R. 183), that petitioner's contention that it was not subject to the Act was refuted by *Seven Up Bottling Co. of Miami*, 92 NLRB 1622, in which the Board decided that it would take jurisdiction "when an employer's operations, though local in character, form an integral part of a multi-state enterprise" (R. 183-184). Next, turning to petitioner's claim that the Board was powerless to assert jurisdiction under the rule enunciated by the Tenth

Circuit in *Shawnee Milling Co.*, 184 F. 2d 67 (C. A. 81), the Examiner said:

> "But this decision was handed down before the Board decided the "7-Up" case. Aside from that, the business of the employer in the *Shawnee* case could hardly be called an "integral part of a multi-state enterprise" in any sense, and that is the criterion applied by the Board.
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> "I hold that it will effectuate the policies of the Act to assume jurisdiction. Accordingly I find that the respondent is engaged in commerce within the meaning of the Act."

The *Shawnee* case, of course, had nothing whatever to do with the Board's discretion to decline jurisdiction. It holds that the Board cannot legally assert jurisdiction over a local enterprice on the ground that it is owned, controlled and operated by an interstate company. The Government (Br. in Opp. pp. 9-10) now purports to distinguish *Shawnee* on the ground that the local plant there involved had no out-of-state imports. But the critical point is that *the Board did not distinguish it on that ground.* The Board made no reference whatever to petitioner's out-of-state purchases in this connection, as the Trial Examiner's statement quoted above shows. *The Board decided this case in the teeth of Shawnee because it disagreed with the Tenth Circuit's holding.*

The Board has not heretofore attempted to make any secret of that disagreement, or of its legal theory that a company like Shawnee, which has no inter-

state inflow or outflow, is subject to the Act if only it is an "essential link" in a "multi-state enterprise" or is controlled by an interstate company. Nor has the Board tried to hide the fact that it regards the presence or absence of inflow or outflow as irrelevant in these "multi-state enterprise" cases. Thus, in *Metropolitan Life Ins. Co.*, 93 N.L.R.B. 381, the Board held that a local housing project was subject to the Act because it was owned by a large insurance company and served as an outlet for investment of the company's funds. Rejecting the employer's contention that the *Shawnee* decision was controlling the Board said:

> "Whatever the applicability of that decision, the Board, with due respect for the opinion of the Court of Appeals for the Tenth Circuit, is constrained to adhere to its original view until the Supreme Court of the United States has had an opportunity to pass on the question.

And in *Grinnell Bros.*, 98 N.L.R.B. 20, 21, the Board, again specifically repudiating *Shawnee*, held that a local retail music store was subject to the Act. The Board did not even mention whether or not the store had any out-of-state imports or exports. It bottomed its holding entirely on the fact that the same employer also owned 24 other stores and a piano factory.

The Board reiterated its policy of proceeding in conflict with the *Shawnee* decision in its *Fifteenth Annual Report*, p. 26, note 77, and in its *Seventeenth Annual Report*, p. 11, note 12.

Despite this unambiguous evidence that the Board predicated its finding that petitioner was "engaged in commerce within the meaning of the Act," exclusively on its "multi-state enterprise" theory, the Government's brief attempts to make it appear that that theory could have no application to the issue of "legal" jurisdiction because, allegedly, the "multi-state enterprise" concept is merely one of a set of "administrative standards" utilized by the Board in deciding whether or not to assert jurisdiction which it otherwise has. But the difficulty with this explanation is that the Board utilized the "integration" or "multi-state enterprise" theory as the basis for *acquiring* "legal" jurisdiction *before* it promulgated its allegedly self-denying jurisdictional policy standards. For example, the Board decided the *Shawnee* in which it held a local company subject to the Act solely because of its relationship with an interstate company, on April 19, 1949 (82 N.L.R.B. 1266, 1277-1278). The "jurisdictional standards" were not invoked by the Board until October, 1950. Nowhere in the standards or elsewhere, has the Board ever indicated that it considers its "integration" concept applicable only to local companies which independently do sufficient interstate business to bring them within reach of the Act.*

*Compare the Trial Examiner's rejection (R. p. 183) of petitioner's distinction of the *Seven-Up* case on the ground that there the local bottler purchased the syrup from outside the state. The Examiner did not suggest that petitioner's incidental out of state imports were relevant in this connection, but stated merely that he "cannot follow this distinction" because petitioner "is a mere distributing agency operating for * * * the syrup made by Coca-Cola Company."

Fully applicable here is this Court's statement in *Securities and Exchange Commission v. Cheney Corp.*, 318 U. S. 80:

> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *.
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> "* * * if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. * * *
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> "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

Moreover, in the *Daniels* and *Gilbert* cases (Pet. pp. 9, 11-12) the Board applied the "integration" theory where there was no "direct" inflow at all. In those cases the Board alternatively relied on the fact that the parts and supplies purchased locally by the dealers originated outside the state. But, as the decision of the Sixth Circuit makes clear, the Board there urged the "integration" theory in support of its jurisdiction, entirely apart from the "source of purchases" theory, and the Court explicitly rejected both grounds for the Board's holding (202 F. 2d p. 579 at 585).

The fact that the Board in those cases articulated both theories whereas in this case it referred to integration alone shows that the Board did not here

rely even alternatively on petitioner's out-of-state purchases. And the fact that the Board in the *Daniels* case urged "integration" in support of its "legal" jurisdiction demonstrates the invalidity of the Government's claim that the Board considers "integration" as bearing only on its discretionary policy with respect to the assertion of jurisdiction.

Petitioner's out-of-state imports played no greater part in the Board's decision in this case than Bill Daniel's direct out-of-state sales, valued in excess of $23,000 yearly, played in the Board's decision in the *Daniels* case. In both cases the fact was mentioned; in neither did it affect the Board's rationale.

II. *The Board is precluded by its own administrative standards from calling upon the Court to assert jurisdiction on the ground of "inflow."*

The Government's brief argues (p. 7, note 5) that the Board's failure to "articulate (the) legal significance" of petitioner's out-of-state purchases, or inflow, is a mere "gap" which can be "filled in by the principles of previously adjudicated cases." This argument has the erroneous premise that the Board actually considered inflow in reaching its conclusion as to commerce.

Very plainly, however, as demonstrated above, the Board is committed to the concept that an employer which it finds to be "an integral part of a multi-state enterprise" is subject to jurisdiction on this ground alone, and quite independently of the existence of other jurisdictional factors. Equally plainly, it has

been demonstrated that this is the only concept relied upon by the Board in asserting jurisdiction throughout the proceedings below.

The obvious question presents itself: if "legal" jurisdiction was to be found in the imports of petitioner, why did the Examiner and the Board never say so? Why did they pass over this supposedly fundamental concept, and resort to elaborate findings and argument to satisfy themselves that jurisdiction existed elsewhere?

The answer is not, as the Government implies, that jurisdiction by reason of inflow is too obvious to merit discussion, or that a "gap" was left in the jurisdictional findings by oversight. The answer is that it was not available to the Board to assert jurisdiction on this ground, because before and throughout these proceedings, the Board had renounced the assertion of jurisdiction on the ground of inflow alone unless annual imports amounted to at least $500,000. *Federal Dairy, Inc.*, 91 N.L.R.B. 638—one of the Board's 1950 jurisdictional "yardstick" cases. As the Board conceded in its brief in the Court below, "Petitioner did not meet the inflow test of the Board's jurisdictional yardstick." (Petition, p. 3, footnote.)

The Board now asks the Court to uphold jurisdiction on grounds which the Board itself has proclaimed to be insufficient to merit its assertion. Almost incredibly, a great administrative agency is inviting the Court to disregard the duly promulgated standards of that agency, to assert jurisdiction on grounds that the agency expressly rejects, and, in order to meet the exigencies of one case, to violate

the hard-won principle that the reviewing court will respect the standards established by the agency in its field.

This is not one of those cases in which it is claimed that the agency applied an administrative standard in an inconsistent manner, and in which the issue is the proper exercise of the discretion. The Board did not say, "We consider that we can properly assert jurisdiction here on the ground of inflow." It correctly disregarded inflow as a jurisdictional factor, and in this respect acted consistently with its own standards. Certainly the position of the Board is inconsistent, but the inconsistency lies not in the manner of its exercise of discretion, but in asking the reviewing tribunal to apply a standard which the Board itself considered inapplicable. The Board does not ask the Court to respect its discretion; it asks the Court to invade it. It demands that the Court assert "legal" jurisdiction in an area where it has itself renounced the assertion of jurisdiction, "legal" or otherwise. It is asking the Court to overturn its own consistent and administratively correct determination that jurisdiction on the ground of inflow should not be asserted.

Since under administrative standards it was proper and correct for the Board to reject inflow as a ground of jurisdiction, and since a correct and consistent administrative determination may not be upset upon review, the Board's strange request that the Court override its correct jurisdictional determination on the inflow issue may not be countenanced.

III. *The assertion of jurisdiction is based solely upon activities of other parties, not involving petitioner, which may not be considered.*

Since inflow may not be considered as a jurisdictional basis, the Board is relegated for a jurisdictional argument to its original and only contention, which is that jurisdiction is made out over petitioner as "an integral part of a multi-state enterprise." Petitioner is therefore clearly within the purview of the *Daniels* and *Gilbert* cases, and there is no jurisdictional factor affecting petitioner which is outside their rationale.

The elimination of inflow also means that the theory of petitioner as "an integral part of a multi-state enterprise" must afford the entire basis for jurisdiction, including what the Board terms "legal" jurisdiction, and cannot be relied on merely as a discretionary basis for assertion of jurisdiction whose "legal" basis is elsewhere to be found. That this theory is inadequate to this task is virtually conceded by the Board, which states in its brief in opposition (p. 8) that the evidence of petitioner's relationship to the Coca-Cola Company went to the "distinct" issue of whether jurisdiction should be asserted, "*assuming legal jurisdiction existed.*" Similarly, it is conceded (p. 10) that the authorities cited by petitioner do hold, as petitioner argues, that "for purposes of determining whether legal jurisdiction exists, operations other than those immediately involved may not be considered."

Divested of the inadmissible factor of inflow, and therefore without basis other than the concededly in-

sufficient theory of an "integral part of a multi-state enterprise," the Board's assertion of jurisdiction was an unwarranted assumption of authority over activities not affecting commerce under the Act.

CONCLUSION

For the foregoing reasons, and for the reasons heretofore stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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